United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

To be argued by
JULIUS TOPOL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X----------X

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

- against -

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; ASSOCIATED HOSPITAL SERVICE, INC., ; GROUP HEALTH INCORPORATED; UNITED MEDICAL SERVICE, INC.; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH AND SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

X----------X

BRIEF FOR APPELLEE DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES

JULIUS TOPOL
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CASES CITED

STATUTES CITED

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BRIEF FOR APPELLEE DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES

PRELIMINARY STATEMENT

Plaintiffs appeal from the Order and Judgment of District Judge Whitman Knapp (USDC SD dated October 10, 1974) dismissing sua sponte the plaintiffs' complaint (313[a])* on the basis of the decision of the Supreme Court in Geduldig v. Aiello, 417 U.S. 484, 42 U.S.L.W. 4905 (1974). In accordance with Aiello, plaintiffs were granted leave to amend their complaint to allege that defendants' plans and policies were adopted as a "pretext" designed to effect sex discrimination (242[a], 254[a]), but the plaintiffs have elected not to replead.

THE CERTIFIED QUESTION

The District Court has, pursuant to 28 U.S.C. 1292(b), certified the following question to this Court:

> "Whether Aiello has established (for the purposes of this action) that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment."

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* References to pages in the Joint Appendix shall be indicated as (____[a]).

Judge Knapp concluded that the above question "is controlling and one as to which 'there is substantial ground for difference of opinion,' and that its resolution would 'materially advance the ultimate determination of the litigation.'"

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The applicable provisions are adequately set forth in the addendum to the Appellants' Brief at pages 56 through 59.

THE COMPLAINT

The complaint alleges that the defendants have violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e) et seq. ("Title VII"), the Fourteenth Amendment to the United States Constitution, and various provisions of State Law by providing health and welfare fringe benefits which are less favorable to women than to men because the coverage and benefits for pregnancy and maternity are restricted as to health and hospitalization insurance benefits (27[a] and 35[a]), disability benefits (36[a] and 39[a]) and maternity leaves of absence (39[a] and 42[a]).

District Council 37 is joined as a defendant in the third cause of action because of its role in negotiating with the City on behalf of the City's employees the allegedly discriminatory insurance plans (35[a]). The hospitalization and medical insurance plans are asserted to have discriminated against municipal employees on the basis of sex by limiting the insurance provided for pregnancy and childbirth (27[a] and 33[a]).

District Council 37 is also joined as a defendant in the fifth cause of action for having "established and administered the DC 37 health and security plan" which offers no temporary disability benefits for pregnancy and pregnancy-related conditions and provides for no pregnancy coverage under the "family major medical option" (37[a] and 38[a]).

District Council 37 is not named as a defendant in the other nine causes of action set forth in the complaint.

THE ORDER AND JUDGMENT APPEALED FROM

The District Court after reviewing Aiello, and plaintiffs' efforts to distinguish and limit the effect

of that decision, concluded Aiello controlling on the allegations of the complaint herein, noting that the Supreme Court's

> "...holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of...sex.' 42 U.S.C. §2000 e(2)(a)(1)."

District Judge Knapp then went on to consider the three procedural courses of action available to him and concluded that the complaint be construed as the plaintiffs had originally intended (to invoke the pre-Aiello law) and be dismissed with leave to replead subject to the certification of the question of Aiello's application to this Court.

POINT I

AIELLO HOLDS THAT A LIMITATION ON MATERNITY COVERAGE UNDER AN INSURANCE PROGRAM IS NOT, PER SE, DISCRIMINATORY.

Plainly, Aiello has established as controlling law that the exclusion or limitation of maternity benefits under a comprehensive insurance program does not constitute sex discrimination, "absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other" 417 U.S. at 496-97.

The Supreme Court noted that such a distinction based on an attribute unique to one gender, but not universal to that gender, does not "discriminate against any definable group" since "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not" 417 U.S. at 496.

Mr. Justice Brennan in his Aiello dissent argued that"dissimilar treatment of men and women on the basis of physical characteristics inextricably linked to one

sex, inevitably constitutes sex discrimination" 417 U.S. at 501. The majority, directly addressing itself to the dissent in footnote 20, stated:

> "The lack of identity between the excluded liability and gender as such under this insurance program becomes clear under the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496-97.

It is noteworthy that the Aiello dissent recognized establishment of "dissimilar treatment of men and women" as the sine qua non of the sex discrimination case. Here, however, the plaintiffs eschew any such limitation. Thus, the plaintiffs allege that the limitations in maternity coverage negotiated by the defendants, even when applied uniformly to the female employee who becomes pregnant and the male employee whose spouse becomes pregnant, somehow discriminate against both men and women on the basis of sex (Complaint, para. 3[d]).

The dissent of Mr. Justice Brennan in arguing that the Court should have applied a stricter standard in determining the Equal Protection question since sex is an "inherently suspect" classification, apparently assumed

that the majority had found permissible "sex discrimination" under the California statute in Aiello. Again, in footnote 20, the majority reiterated its basic finding that there had been no sex discrimination stating,

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." Id. at 496-97.

Finally, it is deemed significant that plaintiffs have refused the District Court's invitation to replead. This is no doubt attributable to plaintiffs' awareness

that the limitations on maternity coverage were not, in fact, negotiated by the defendants with discriminatory animus.

POINT II

THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO ALLEGE THAT WOMEN ARE ACCORDED DISPARATE TREATMENT UNDER THE EXISTING SCHEDULES OF HOSPITAL, MEDICAL AND DISABILITY INSURANCE BENEFITS.

The gravamen of the complaint herein is that since pregnancy, a uniquely female occurrence, is singled out for less liberal benefits than those provided for other sexually neutral medical occurrences, per se sex discrimination exists. (Appellants' Brief p. 22.) But, obviously, this approach puts the cart before the horse.

If Aiello tells us anything, it is that the mere omission of a gender-related risk cannot support a claim of discrimination under either the Fourteenth Amendment or Title VII of the Civil Rights Act. (417 U.S. at 496-97 fn. 20.) Thus, the pertinent inquiry must be directed, not to what benefits have been restricted or omitted, but rather to those which have been negotiated

and included. It is only by alleging that existing benefits have a disparate impact on a protected class that a viable cause of action for discrimination is stated. Here, not only does the complaint fail to assert such disparate treatment, but by implication concedes that the existing coverages are sexually neutral.

Surely, none of the sex discrimination cases cited at page 12 of the Appellants' Brief serves to sustain this complaint.* Rosen and Fitzpatrick, respectively, involve a private pension plan and a state retirement system, both of which accorded disparate treatment to male employees by providing that the male employee retiring at the same age with the same years of credited service as the female employee would receive a lesser, actuarially reduced, pension. In Bartmess, female employees were required to retire at age 62 while males could continue working until age 65. Thus, in each of

*Bartmess v. Drewreys Ltd. USA., Inc. 444 F2d 1186 (7th Cir) cert. den., 404 U.S. 939 (1971); Rosen v. Public Serv. Elec. and Gas Co., 477 F2d 90 (3rd Cir. 1973); and Fitzpatrick v. Blitzer, 8 FEP 875 (D.C. Conn. 1974).

these cases, employees of one sex were treated more favorably than those of the other.

District Council 37 surely would have no quarrel with the plaintiffs on any of the patently discriminatory fact situations presented by the foregoing decisions. However, in the case at bar, the plaintiffs by neglecting to allege disparate impact of existing insurance benefits upon female City employees, don't even assert any claims which resemble those of the cases upon which they rely.

As bargaining agent for most City employees, DC 37 at all times recognized that the City's resources were finite. During successive negotiations choices were necessarily made, not only between the amounts applied to wages as opposed to fringe benefits, but also between the various types of fringe and insurance benefits available. (Aiello, 417 U.S. at 495-96.) However, at no time has DC 37 ever negotiated any benefit that could fairly be construed as discriminating against, or in any way short-changing, its tens of thousands of women members.

CONCLUSION

THE DECISION AND JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

JULIUS TOPOL
Attorney for Appellee
District Council 37, American Federation of State, County and Municipal Employees
140 Park Place
New York City 10007
(212) 766-1043

Dated: February 27, 1975

AFFIDAVIT OF PERSONAL SERVICE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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WOMEN IN CITY GOVERNMENT UNITED, et al,

:

Plaintiffs-Appellants,

- against - :

THE CITY OF NEW YORK, et al,

:

Defendants-Appellees.

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD P. MARGOLIUS, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Great Neck, New York. That on the 28th day of February 1975 deponent served the within Brief for Appellee District Council 37, American Federation of State, County and Municipal Employees upon Merkin, Barre, Saltstein and Gordon, P.C. at 98 Cutter Mill Road, Great Neck, New York, by delivering a true copy thereof to Perry C. Burkett. Deponent knows the person so served to be a member of the firm described in the said papers as the attorneys for Social Service Employees Union and Social Service Employees Welfare Fund.

Richard P. Margolius

Sworn to before me this
28th day of February, 1975.

Irene H Slosser

IRENE R. SLOSSER
Notary Public State of New York
No. 31-9045200
Qualified in New York County
Commission Expires March 30, 1976

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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WOMEN IN CITY GOVERNMENT UNITED, et al,

Plaintiffs-Appellants,

- against -

THE CITY OF NEW YORK, et al,

Defendants-Appellees.

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ROSE M. LYNCH being duly sworn deposes and says that deponent is not a party to the action, is over 18 years of age and resides at Flushing, New York. That on the 27th day of February, 1975 deponent served the within Brief for Appellee District Council 37, American Federation of State, County and Municipal Employees upon

Trubin, Sillcocks, Edelman & Knapp and Attorneys for Defendant Appellee, Group Health Incorporated

Bertram Perkel Attorney for Defendant-Appellee, District Council 37 Health & Security Plan

at 375 Park Avenue, NYC 10022 and 150 East 58th Street, NYC 10022, respectively, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an offical depository under the exclusive care and custody of the United States post office department within New York State.

Rose M. Lynch

Sworn to before me this
27th day of February, 1975.

THOMAS T. KILHENNY
NOTARY PUBLIC, State of New York
No. 41-2113050
Qualified in Queens County
Commission Expires March 30, 1976

Two

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CORPORATION COUNSEL

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RABINOWITZ, BOUDIN & STANDARD

Attorneys for Plaintiffs

FEB 27 1975

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ATTY'S FOR: Blue Cross